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No. 82-1371

In the Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF HEALTH AND HUMAN SERVICES,
PETITIONER

v.

LEON S. DAY, ET AL.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

The Respondents restate the Questions Presented by the Petitioner more narrowly, as follows:

1. Whether, upon the factual record before them, the courts below erred in concluding that unduly lengthy, unexplainable, non-claimant caused delays experienced in obtaining administrative appellate action by those seeking to acquire or retain Security disability insurance benefits violated the claimants' statutory right to "reasonable notice and opportunity for a hearing," 42 U.S.C. § 405(b).

2. Whether, upon finding clear violations of 42 U.S.C. § 405(b) based upon the undisputed factual record, the courts below exceeded or abused their powers in imposing reasonable limits with explicit exceptions upon administrative appellate actions, and in providing for a recoupable, prospective payment sanction in favor of wronged claimants to insure compliance with the order.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondent Leon S. Day and Amedie Maurais, on behalf of themselves and all others similarly situated, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's judgment in this case, as reported at 685 F. 2d 19.

STATEMENT OF THE CASE

The instant case concerns unduly lengthy delays incurred by Vermont claimants in obtaining administrative appellate action within the disability insurance benefits (DIB's) program created under Title II of the Social Security Act, as amended. 70 Stat. 815, 42 U.S.C. § 423(a). Section 205(b) of the Act is the statutory basis of the administrative appellate rights that were found to have been denied below. The heart of § 205(b) is the guaranty of "reasonable notice and opportunity for a hearing."[1] 42 U.S.C. § 405(b).

While the Petitioner's (Background) Statement provides a general overview of evolving Social Security Administration (SSA) appeal statistics, Pet. at 3-6, it makes no mention of the factual record considered by the courts below. Yet in enjoining unreasonable delays at both the reconsideration and hearing phases of the administrative appeals process, the district court carefully considered detailed data outlining minute aspects of the inner-workings of both the Vermont Disability Determination Agency (DDA)[2] and the Office of Hearings and Appeals (OHA) that covers the State of Vermont. Indeed, this factual development was crucial to the outcome of the case below.

Named plaintiff Leon S. Day had been disabled for two years when the Secretary concluded that his disability had ceased and terminated the DIB's received by him and his four dependents. This represented about 2/3's of

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[1] An examination of the Act reveals that petitioner errs in stating that Congress helped devise the "four-level system of administrative consideration of disability claims." It was the agency alone, acting under its authority to promulgate regulations, that added the initial appellate step of "reconsideration", and the final post-hearing step of "appeals council review." Each step must be exhausted before individual claims can be judicially reviewed. See Petition (hereinafter, Pet.) at 3-4.

[2] The DDA is the state agency that performs both initial and reconsidered disability determinations for SSA in Vermont, pursuant to 42 U.S.C. § 421.

their monthly income. (C.A. App. 7a and 10a) Mr. Day requested reconsideration and received an unfavorable reconsideration determination only after some 167 days had passed. A subsequent hearing request resulted in a hearing 173 days later (about 2 H weeks after this lawsuit was commenced.) (Pet. at 7) Thus, Mr. Day waited 340 days to obtain a hearing after initiating his appeal. However, nothing he did caused the delays. For example, though the hearing request was instituted promptly, the SSA district office erroneously held his file for two months, in direct violation of the Secretary's procedure. (C.A. App. 46a and 36a). The delays experienced by intervenor Amedie Maurais - 280 days to hearing from initiation of appeal - were similar. (Pet. at 7) Similar, too, were the consequences of delay. In Mr. Day's case, for example, the family accumulated large debts and was forced to move (C.A. App. 8a, 11a). Yet both named plaintiffs ultimately prevailed in reversing the cessation determinations and regaining their lost benefits. (Pet. App. D at 14a; C.A. App. 288a).

The classwide factual record proved the experiences of Day and Maurais to be typical of the problems besetting Vermont disability claimants. With regard to reconsiderations, the district court learned, *inter alia*, that their annual number remained largely constant from year to year while DDA staffing and budget showed marked annual increase (C.A. App. 294a - 295a); that between October 1, 1977 and January 31, 1980, only 454 reconsideration requests were processed (C.A. App. 96a - 97a); that a number of cases took well over a year to "reconsider" (C.A. App. 69a); that the trend in mean processing time was steadily escalating (C.A. App. 96a), though the Secretary had projected a decrease (C.A. App. 40a); that 35% of a random sample of 77 case summaries[3] had not been processed within 90 days[4] (Pet. App. E at 28a; C.A.

[3] The Secretary conceded to the district judge that this data was "representative of the reconsideration process." (Pet. App. E at 26a, n. 6.)

[4] In continuing disability investigation (CDI) cases, in which those found no longer disabled lose their benefits, fully 50% had not been processed within 120 days.

App. 98a, 141a - 171a); that in innumerable cases there were vast gaps of unexplained delay, often at several stages of the reconsideration process in the same case, with claimant-caused delay virtually non-existent[5] (C.A. App. 183a - 289a); and that over one quarter of the cases in Vermont's region were reversed upon reconsideration, in favor of claimants (C.A. App. 42a). The district court concluded that "...when the *explained* delays in the case summaries are subtracted, most, if not all, of the cases could have been completed within 90 days." (emphasis in original) (Pet. App. E at 28a).

As to procedures governing the scheduling of hearings in Vermont, the trial court learned that the Secretary utilized only three administrative law judges (ALJ's), exactly what she had projected as needed (C.A. App. 38a); that the Vermont caseloads were significantly below national goals set for ALJ dispositions (C.A. App. 36a, 38a; Pet. at 5); that only 342 hearings were requested and 233 held between January 1977 and December 15, 1978 (C.A. App. 35a - 36a); that the Secretary had a *stated policy* to schedule all Vermont hearings within 90 days[6] (C.A. App. 39a, 41a), which goal she was not meeting in well over 50% of the Title II cases (C A. App. 53a - 57a); that the delays were marked by non-claimant caused error, sometimes for reasons contravening SSA regulation or policy (C.A. App. 36a and 46a); and that hearing decisions ultimately reversed determinations adverse to Vermont claimants in a remarkable 56.2% of Title II

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[5] DDA failures to obtain or review medical evidence, to generate notices, or to coordinate with other components of the system (such as properly moving files), as well as specific systems "limitations" or other failures, proved to be the main causes of delay (C.A. App. 183a - 266a). These factors were well recognized by the district court. (Pet. App. E at 25a)

[6] When the instant case began, the Secretary was then (and is) under the mandate of the 90 day-to-hearing order of *Barnett v. Califano*, 580 F.2d 28 (2d Cir. 1978) for SSI cases in Vermont. However, the Secretary evinced no procedural difficulty in fully complying with the order. Indeed, we have been told that only two failures to comply with the judicial deadlines have ever occurred in Vermont.

cases (comparable figures were 55.1% for the region and 56.1% nationwide).[7] (C.A. App. 42a).

With its limited emphasis upon national data alone, the Petition at 5 - 6 stresses escalating numbers of appeal requests. Notwithstanding increases in the ALJ corps, support staff and case efficiency, the Petition implies that lengthy delays are inevitable. A large part of the blame is said to be the 1980 legislative requirement[8] that CDI cases be periodically reviewed, which "... predictably will result in an increase in the number of recipients whose benefits are terminated and who subsequently request reconsideration and an ALJ hearing." (Pet. at 4). Yet as Petitioner later concedes, this very requirement was relaxed by Congress in 1982 to afford "... the Secretary flexibility in selecting cases for periodic review in order to enable him to accomodate the backlog of new applications and state staffing levels."[9] (Pet. at 20). Similarly, no mention is made of the Secretary's early 1981 decision "... to review as many cases as possible...[without] waiting for the periodic review provision of the new law to become effective."[10] SSA Program Circular No. 08-81-ODP, SSA Pub. No. 64-004 (April 27, 1981); see also Program Operations Manual System (POMS) § E 2820, *Accelerated Release of Unscheduled Title II CDI's* (March, 1981). Thus, the Secretary selected over 30,000 additional CDI cases for monthly review beginning in March, 1981, solely based upon the agency's discretionary decision to do so.[11]

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[7] The latter figure has now risen to an even more astounding 65%. S. Rep. 97-648, 97th Cong., 2d Sess. (1982) at 6.

[8] 42 U.S.C. § 421(i); see n. 10, *infra*.

[9] Pub. L. No. 97-455, §3, 96 Stat. 2499 (1982). *See*, discussion, infra, at 24-25.

[10] Sections 304(a) and 311 (a) of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 457, in amending § 211(i) of the Act, provided that the periodic review requirement was to commence in January, 1982.

[11] In FY 1982, 506,000 cases were reviewed; in FY 1983, SSA plans to review 640,000. Sen. Comm. on Finance, Staff Data and Materials Related to the Social Security Disability Insurance Program, No. 16, 97th Cong., 2d Sess. 52-53 (1982).

Likewise, other discretionary policy decisions[12] on the national level have exacerbated the problem of hearing delay. These include repeated decisions to freeze the hiring of new ALJ's and staff throughout much of the last two years;[13] official policies encouraging state disability agencies and ALJ's to disregard judicial precedent;[14] establishment of quota systems for individual ALJs creating maximum acceptable percentages of cases that may be decided in favor of claimants;[15] and failure to curtail hearing requests by insuring proper workup by state disability agencies that often obtain information inadequate to properly dispose of cases at initial and

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[12] Respondents do not suggest that the Secretary lacks discretion in administering the Social Security disability program (so long as statutory and constitutional requirements are complied with). Rather, they note simply that discretionary policy decisions have had a foreseeable impact upon the statutory right to reasonably prompt appellate action, while little concomitant effort has been made to address that negative impact.

[13] *See, e.g.*, Pres. Doc. re: Hiring Freeze, 46 Fed. Reg. 9907; both the President and the Secretary have imposed freezes.

[14] This is accomplished either through issuance of non-regulation Social Security Rulings (SSR's) of "non-acquiescence" to federal court decisions or failure to publish regulations implementing appeals court decisions. The resulting lack of uniformity in decision-making causes numerous remands from the federal courts and contributes to the backlog of cases. These policies are challenged in pending litigation such as *Rivera v. Schweiker*, No. 82-3331 (D.N.J., filed as class action, Oct. 7, 1982) and *Lopez v. Schweiker*, No. 82-5322 AWT (C.D.Ca., filed as nationwide class action, Dec. 29, 1982). In *Chee v. Schweiker*, Civ. 82-693-PCT-VAC (D.Az. Dec. 15, 1982), the court voided SSR 82-49c.

[15] This policy is the subject of a recent lawsuit brought against the Secretary by her own ALJ's. *Association of Administrative Law Judges, Inc. v. Schweiker*, C.A. No. 83-0124 (D.D.C., motion to dismiss as to HHS defendants denied, Mar. 14, 1983).

reconsideration levels.[16] In any event, it seems clear that congressional mandates or increasing caseload volume do not completely explain the pressures upon the Secretary alleged in the Petition.

The courts below rejected all the Secretary's arguments seeking to justify unduly lengthy delay. Finding that hearing delays in Vermont violated § 205(b) of the Act, Pet. App. D, and some two years later finding that reconsideration delays did as well, Pet. App. E, the district judge enforced the claimants' statutory rights by imposing deadlines to complete reconsiderations and to schedule hearings that were well within the Secretary's capabilities.[17] Most significantly, the court *excepted* from its time limitations all those cases wherein delay is "... caused at the claimant's instance or where the delay is assignable to the claimant's contention that changed circumstances mandate reconsideration of additional evidence." Pet. App. E at 30a. These exceptions were drafted in careful detail, Pet. App. F at 33a - 34a, and convinced the court of appeals that "... the relief ordered was crafted with an eye toward the Secretary's concerns," including the need "... to assure accurate results."[18] Pet. App. A at 8a. Finally, to insure SSA compliance with its order (and not incidentally, to prevent irreparable injury to wronged claimants), the district court drew upon its equitable powers to provide for a recoupable, prospective interim payment sanction in

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[16] See, Bloch, *Representation and Advocacy at Nonadversary Hearing: The Need for Nonadversary Representatives at Social Security Disability Hearings*, 59 Wash. Univ. Q. 349 (1981); Senate Comm. on Governmental Affairs, 97th Cong. 2d Sess. Oversight of the Social Security Administration Disability Reviews, (Comm. Print Aug. 1982).

[17] The court vested the Secretary with maximum flexibility by leaving ALJs unlimited post-hearing time to fully develop issues. Pet. App. D at 19a. But the processing times themselves were chosen based upon a capacity that was both acknowledged by the Secretary and clearcut from the factual record.

[18] The exceptions responded directly to the Secretary's professed concern that lack of claimant cooperation and medical information were the primary causes of delay. C.A. App. 40a.

favor of claimants who continued to suffer illegal unreasonable delay. Indeed, although the outer-bound of a routine reconsideration processing was found to be 90 days, the trial court disallowed interim relief until the passage of 180 days, being "... persuaded that this solution most appropriately balances the administrative difficulties in implementing this order and the financial needs of deserving claimants." Pet. App. E at 31a. The court of appeals affirmed in all respects.

SUMMARY OF ARGUMENT

Section 205(b) of the Social Security Act provides Respondents and all other persons seeking Social Security disability insurance benefits the right to administrative appellate action including "reasonable notice and opportunity for a hearing." 42 U.S.C. §405(b). The court below, like every other court of appeals that has considered the issue, found the statute to guaranty the right to a hearing within a reasonable time. *White v. Mathews*, 559 F. 2d 852, 858 (2d Cir. 1977), *cert. denied*, 435 U.S. 908; *Caswell v. Califano*, 583 F. 2d 9, 16 (1st Cir. 1978); *Blankenship v. Sec'y of HEW*, 587 F. 2d 329, 334 (6th Cir. 1978); *Wright v. Mathews*, 587 F. 2d 345, 351 (7th Cir. 1978).

The court below, on the extensive Vermont factual record, found routine lengthy delays in appellate action that were solely attributable to the Secretary and contrary to her own policies. Like every other court of appeals confronting a similar factual record, the court concluded that the Secretary was in breach of her duties owed to disabled persons under § 205(b) of the Act. *See, e.g., White, supra* at 858-59; *Caswell, supra* at 15; *Blankenship, supra* at 334. Although the *Wright* case found no violation of § 205(b), the Seventh Circuit's decision is distinguishable due to the different "nature of the particular [i.e. old age and survivor's but not disability] benefits" and the failure of the plaintiffs therein to demonstrate that the Secretary was responsible for the delays. 587 F.2d at 350,n.5,356,353; cf, *Mathews v. Eldridge*, 424 U.S. 319; *California Department of Human Resources v. Java*, 402 U.S. 121.

Each court of appeals that has found violations of § 205(b) has imposed a remedy. The court below followed the majority (First and Second Circuit) rule in imposing time limits, with liberal exceptions to insure accurate and thorough decision-making and to prevent overburdening the Secretary. The *Blankenship* approach differs only insofar as the Sixth Circuit ordered the Secretary to adopt appeal processing time limits by regulations. Significantly, the Sixth Circuit's order has been resisted by the Secretary for five years and has not prevented continuing violations of § 205(b).

Choice of remedy to cure present statutory breaches is a basic judicial function grounded in the broad sweep of equitable powers. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682; *Hutto v. Finney*, 437 U.S. 678; *Hecht v. Bowles*, 321 U.S. 321. The order below, to enforce § 205(b), is inconsistent with no judicial or statutory authority.

Nationwide claims of administrative burden raised by the Secretary only upon appeal are both dubious and unrelated to the instant case. The court below ruled based upon the Vermont record before it and found the Secretary's problems to be of her own making.

Even on a national level, the Secretary has repeatedly taken actions that have exacerbated § 205(b) problems. Erroneous representations to Congress have prevented the commitment of available resources. Recently, however, Congress has become increasingly aware of the delay problem and present legislative activity mitigates against any action by this Court.

ARGUMENT

I. THERE IS NO DISPUTE AMONG THE COURTS OF APPEALS AS TO EITHER THE MEANING OF §205(b) OF THE SOCIAL SECURITY ACT OR THE POWER OF A COURT TO DISCERN VIOLATIONS OF THE STATUTE UPON THE FACTS BEFORE IT.

(A) Section 205(b) of the Social Security Act states that aggrieved claimants and recipients seeking benefits are

entitled to "reasonable notice and opportunity for a hearing." 42 U.S.C. § 405(b). This statutory requirement has been interpreted by four circuit courts of appeals. Each has reached an identical conclusion as to the meaning of the statute.

The Second Circuit, in *White v. Mathews*, 559 F.2d 852 (2nd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), was first to address the question. The court read § 205(b) "... as giving the claimant a right to a hearing within a reasonable time and we do not understand the Secretary to dispute this construction." 559 F.2d at 858. This interpretation of the statute has been followed in a line of Second Circuit opinions that have rejected every conceivable argument of the Secretary, *i.e.*, *Barnett*, *supra*, and *Sharpe v. Harris*, 621 F.2d 530 (2d Cir. 1980), culminating in the instant case, Pet. App. A at 3a, n.3 (wherein, still, "the Secretary does not challenge this interpretation.")

Identical conclusions of law have since been reached by the First, Sixth, and Seventh Circuits. Thus, *Caswell v. Califano*, 583 F.2d 9, 16 (1st Cir. 1978) ("right to a hearing within a reasonable time") and *Blankenship v. Secretary of HEW*, 587 F.2d 329, 334 (6th Cir. 1978) ("the Secretary has a duty to provide a hearing within a 'reasonable' time") have intepreted the law in identical fashions. Similarly, in *Wright v. Mathews*, 587 F.2d 345, 351 (7th Cir. 1978), the Seventh Circuit agreed "... that the SSA is under a statutory duty to provide hearings and Appeals Council reviews within a 'reasonable time.' "

(B) In the instant case, the district court found that the delays suffered were so endemic and so susceptible to correction that a violation of § 205(b) by the Secretary was easily discernable. Careful heed was paid to problems of administrative burden raised by the Secretary, which were weighed against the evidence of unreasonable delays before the court. Upon considering the Vermont record before it (which, significantly, contained virtually none of the nationwide data injected into this proceeding by the Secretary only upon appeal), the court found that uncontroverted lengthy delays could not be justified.

Similarly, each federal court of appeals that has considered the issue of unduly lengthy delays in the administrative appeals of claimants seeking Social Security disability benefits has found the Secretary to be in violation of § 205(b) of the Act. Delays in the Titles II and XVI disability programs are of paramount concern, of course, for as Petitioner concedes, "(t)he vast majority of these hearing requests are in disability cases." Pet. at 4.

Thus, the first case to consider the question of unreasonable delay, *White v. Mathews, supra,* did so in the context of the Title II disability program that was involved in the instant case. In *White,* the Second Circuit was clearly impressed with the extensive factual record developed by the district court below it. The court of appeals noted, e.g., that delays ran the better part of a year, that the ALJ reversal rate exceeded 50% and that the court below had carefully explored the administrative difficulties besetting SSA that had caused the delays to occur. *White,* 559 F.2d at 858-59. Finding support in this Court's rulings in *Mathews v. Eldridge,* 424 U.S. 319 (1976) and *NLRB v. Rutter-Rex Mfg. Co.,* 396 U.S. 258 (1969), the Second Circuit concluded upon the facts that administrative problems did not make reasonable the pervasive failure to provide hearings in the timely fashion contemplated by Congress in legislating § 205(b). *Ibid.* Shortly thereafter, in a Title XVI disability delay case, the Second Circuit again found a statutory breach based upon a similar factual record. *Barnett, supra,* 580 F.2d at 30 - 31. Other Second Circuit cases have also followed *White* in pertinent part. *See, e.g., Sharpe, supra; Martinez v. Califano,* No. 73-C-900 (E.D.N.Y., Jan. 3, 1978).

Social Security disability administrative appellate delays have similarly been held unreasonable upon factual records developed within the First and Sixth Circuits. In *Caswell, supra,* the First Circuit was confronted by a record showing an average elapsed time of 569 days between hearing request and decision, with none of the plaintiffs "... charged with any default or action which delayed scheduling of the hearings." 583 F.2d at 12. The record also established reversal rates and specific logistical difficulties encountered by the Secretary which were

similar to those identified in *White*. *Id.* at 12 - 13. Thus, the First Circuit concluded that the Secretary was "... under a statutory duty to hold hearings within a time that is reasonable *under the circumstances;* and we are also satisfied *on this record* ... that the lower court did not err in finding that the delays then experienced by plaintiffs were unreasonable." (emphasis added). *Id.* at 15. The court of appeals even emphasized that future changed circumstances might merit modification of its order by the district court. *Id.* at 18.

In *Blankenship, supra,* the Sixth Circuit noted the absence of absolute standards to determine what is reasonable. It focussed on the nature of the proceedings and the agency's problems in processing disability appeals. Citing the examples of the named plaintiffs who had all waited a year to a year and a half for favorable decisions, the court found that median delays of 220 days and the substantial hardships suffered as a consequence outweighed the administrative difficulties besetting SSA. The facts established "... that the delays faced by the plaintiffs *in the present case* are unreasonable and contrary to the agency's statutory mandate." (emphasis added). *Id.* at 334.

The Seventh Circuit is the only other court of appeals to reach the merits of a case alleging unreasonable delays in SSA appeals. While it is true that *Wright, supra,* reached a conclusion seemingly at odds with the substantial weight of authority discussed hereinabove, Respondents submit that the case is distinguishable on a number of grounds. As the Seventh Circuit itself emphasized in distinguishing its ruling from *White, Caswell* and their progency more critically than does the Pet. at 14, n. 15, the *Wright* plaintiffs sought only retirement and survivors benefits and not the disability benefits at issue elsewhere. 587 F.2d at 350, n. 5. The named plaintiff claimed an *increase* in an old age pension due to failure to credit his late wife's work record. 587 F.2d at 347 and 355. The "nature of the particular benefits" was in large part responsible for *Wright's* legal conclusions. *Id.* at 356.

In *Mathews v. Eldridge, supra,* 424 U.S. at 341 - 42, this Court recognized the often significant hardships

endured by physically disabled workers, who have fewer options than the average retired person or survivor who may find "temporary employment to ameliorate the interim loss."[9] In *Wright*, the Seventh Circuit seemed cognizant that in appeals involving reconstruction of work records, uncredited earnings, or disputed family relationships, the proof may be as complex as in the welfare benefit area where a wide variety of information, including witness credibility and veracity, may be critical. In contrast, this Court has emphasized that the disability determinations not at issue in *Wright* are "... more sharply focussed and easily documented decision[s] [which] ... will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists' ..." *Eldridge*, 424 U.S. at 343 - 44.

The Seventh Circuit's concern that "unreasonableness" would take so many forms as to make a court incompetent to act, 587 F.2d at 352 - 53, is lessened considerably by the careful documentation in the instant case of numerous, unjustified examples of non-claimant caused delay, by the Secretary's own professed capacity to comply with the remedy adopted, and especially by the district court's careful crafting of exceptions to its general time limitation rules. C.A. App. 39a; Pet. App. F at 33a - 34a. Yet straining to analogize to *Wright*, the Petitioner accuses the courts that have condemned delays in disability cases of having "myopically consider[ed] only respondents' individual concerns," Pet. at 20. On the contrary, as discussed hereinabove, each disability delay case reached its inescapable legal conclusion only after scrutinizing the administrative burdens upon the Secretary and balancing them against the acute needs of disabled persons trapped interminably within the appeals system through no fault of their own.

The legal conclusion in *Wright* is best understood from the perspective of plaintiffs' failure therein to allege or prove a pattern of SSA actions or inactions which

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[9]The Secretary herself cited a report finding likely "great damage" and "high psychic costs" resulting from delays in the disability program processes. *Barnett*, 580 F. 2d at 32.

caused lengthy delays. 587 F.2d at 353. Yet, much as this Court relied upon the factual record to identify delays in the scheduling of California unemployment hearings in violation of the Social Security Act, *California Dept. of Human Resources v. Java*, 402 U.S. 121, 133 (1971),[20] so too did the lower courts in the instant case have the well-developed factual record that was absent in *Wright*. Thus, *Wright (and FTC v. Weingarten*, 336 F.2d 687,692 (5th Cir. 1964), where there was a "passage of time and nothing more") are easily distinguishable, for there was insufficient factual development therein to establish the unreasonable nature of the hearing delays and the resultant violation of § 205(b) of the Act.

It can be seen, then, that every court that has considered the issue agrees that claimants are entitled to administrative appeals within a reasonable time. Furthermore, there is no disagreement that, given a sufficient factual record, the courts have properly declared that the Secretary has failed in her duty to provide reasonably prompt appeals.

II. THE COURTS OF APPEALS UNIFORMLY RECOGNIZE THEIR OBLIGATION TO REMEDY VIOLATIONS OF §205(b) OF THE SOCIAL SECURITY ACT.

(A) Each court of appeals that has considered the merits of a Social Security disability delay case has required the Secretary to remedy breaches of her statutory duties. The Secretary raises the spectre of "different results". Pet. at 12. In fact, however, the orders of the First, Second and Sixth Circuits differ only in certain respects as to remedy, based in large part upon the differing factual records before each court at the time of its deliberations. In any event, differences in remedial approach hardly necessitate the intervention of this Court.

In the instant case, the district court considered the problem of remedy against the backdrop of two possible injunctive approaches: an order that the Secretary process/schedule appeals within a reasonable deadline (the

[20] *See, also, Fusari v. Steinberg*, 419 U.S. 379, 388 (1975).

approach in the First and Second Circuits); or an order that the Secretary promulgate regulations to cure the statutory violations (the Sixth Circuit mechanism). Not surprisingly, it chose the former course of action. This remedial approach was initiated in *White*, wherein the court required ALJ disability hearings[21] to be concluded within 120 days of request. The *White* order gave the Secretary years of lead time before the 120 day deadline took effect, and provided both the detailed exceptions to the general deadline rule and interim payment sanctions that were followed in the instant case. 559F.2d at 855,860.

White was followed in *Barnett, supra*, with two new twists. The district court order that was approved required the mere *scheduling* of hearings within a deadline, albeit within 90 days (after a year of lead time). However, the Second Circuit found this approach "... to be less of a burden for the SSA in most cases than determining the disability issue within 120 days, as in *White*." 580 F. 2d at 32. More importantly, the court of appeals found that the district court had "abused its discretion" in ordering interim payment sanctions to be nonrecoupable by the Secretary. Stressing the delicate equitable solution inherent in balancing the litigants' interests, the court modified the judgment below and required interim payments to be refundable. Subsequently, *Sharpe* and *Martinez, supra*, also followed *White* and *Barnett* in pertinent part.

The First Circuit approach adopted in *Caswell, supra*, differed in no meaningful respect, for the court adopted a 90 day-to-hearing remedy identical to *Barnett*. While it is true that the Maine district court below had declined to impose an interim payment sanction "at this time" (preferring instead to monitor the Secretary's compliance), 435 F. Supp. 127, 136, it is inaccurate to conclude (as does the Petition at 12-13) that the First Circuit's decision diverged in any way from the Second Circuit approach. The interim payment sanction was simply not before the

[21] Reconsideration delays were not at issue in *White* or any other case discussed hereinafter.

former court of appeals in *Caswell*..[22]

The 1978 remand order of the Sixth Circuit in *Blankenship v. Secretary of HEW*, 587 F. 2d 345, *supra*, established the alternative remedial approach of ordering the promulgation of regulations by the Secretary. In making this ruling, the Sixth Circuit vacated the district court's time deadline remedy, preferring to give the Secretary "... an opportunity to develop a nationwide rule ... the preferable remedy ... establishing *reasonable time limits* for conducting hearings..."[23] (emphasis added). 587 F. 2d at 336. Yet the Secretary failed in this "opportunity". After proposing three consecutive sets of regulations imposing time-limits, each of which was in turn approved by the district court on remand, the Secretary ultimately chose to forego publication of any of the court-approved deadlines, and petitioned for complete relief from the Sixth Circuit's mandate. This prompted the frustrated Kentucky district court to require publication of the regulations last submitted by the Secretary and to order an

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[22] Although it is now in *Crosby v. Social Security Administration*, 550 F. Supp. 1278 (D. Ma. 1982), *appeal pending*, No. 83-1077 (1st Cir. 1983). There, based upon the Secretary's dismal failure to achieve even 50% compliance with a preliminary order requiring hearings to be concluded within 165 days of request (as per her own then proposed regulations) the district court ordered hearing deadlines *with* an interim payment sanction. 550 F. Supp. at 1279, n. 4 and 5, 1282-83. In so doing, *Crosby* cited the need for interim payments as a compliance mechanism, as articulated in *Blankenship v. Secretary of HHS*, 532 F. Supp. 739 (W.D. Ky., 1982), discussed *infra*.

[23] Likewise, the other courts of appeals also would respond favorably to an ultimate comprehensive solution to the unreasonable delay problem, whether from Congress or the Secretary. *See, e.g., Caswell*, 583 F.2d at 18; *White*, 559 F.2d at 861; *Barnett*, 580 F.2d at 32; *Day*, Pet. App. A at 7a.

interim payment sanction.[24] 532 F. Supp. at 743.

Having found no violation of § 205(b) in *Wright*, the non-disability case, the Seventh Circuit never reached the question of remedial action. Yet since *Wright* was decided, this Court has emphatically rejected the Seventh Circuit's underlying notion that the judiciary lacks equitable powers to implement the Social Security Act by requiring procedures not authorized by the Secretary. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).[25] Even *Wright* conceded that "judicial intervention may be needed at some point." 587 F. 2d at 356. Indeed, the Seventh Circuit has since concluded that a factual record establishing delay to be unwarranted is sufficient justification to require Medicaid claims to be processed within judicially imposed time limits, with a sanction of automatic eligibility for violations. *Smith v. Miller*, 665 F. 2d 172 (7th Cir. 1981).

In the instant case, neither court below can seriously be critiqued for the remedial approach adopted. The district court gave careful attention to the need for uniform, thorough, and accurate decision-making, as is apparent in the liberal exceptions to the ninety day deadline. Pet. App. F at 33a, 34a. Given the Secretary's assurance of ability to comply, C.A. App. 39a, 41a, the court was justified in concluding, as stated in *Wright, supra*. at 353, that "SSA could increase its productivity under the present

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[24] In addition to being cited favorably in *Crosby, supra* at n. 22, this approach has been followed to the letter by a district court in the Eighth Circuit in *Williams v. Schweiker*, 541 F. Supp. 1360 (E.D. Mo. 1982). It should also be noted that one other court of appeals has considered a district court order enjoining disability program delays. In *Cockrum v. Harris*, 634 F.2d 1358 (D.C. Cir. 1980), *vacating and remanding* 475 F. Supp. 1222, the District of Columbia Circuit never reached the merits. Instead, its order was premised solely upon the belief that regulations were imminent, pursuant to *Blankenship*. App. A, attached hereto. Significantly, the court was assured by the Secretary that a 90 day-to-hearing, 30 days (more) - to -disposition rule would remain in effect in the District of Columbia until final approval of the anticipated regulations.

[25] Significantly, *Yamasaki* favorably cited the approach of the First Circuit in *Caswell*. 442 U.S. at 706, n.18.

resource constraints." The wisdom of the remedial approach chosen below is especially obvious when compared to the consequences resulting from the remand ordered in *Blankenship* by the Sixth Circuit, after its recognition in 1978 of statutory violations indistinguishable from those at issue here. These results, including conceptual difficulties for the district judge, wasted judicial and administrative resources, and especially the absence of relief for the wronged plaintiffs, are now under review by the Sixth Circuit, five years later. *See, Blankenship*, 532 F. Supp. at 742 - 44; Pet. at 13, n.14. Indeed, if the Sixth Circuit affirms the lower court's order, the courts of appeals will all have settled on essentially the same remedy in seeking to bring the Secretary into compliance with the Act.

(B) In considering the DIB program, this Court has restated the Secretary's acknowledgement that the " '... system must be fair - and it must work.' " *Richardson v. Perales*, 402 U.S. 389, 399 (1971). This Court has also noted on numerous occasions that, in cases of "nigh interminable delay," procedures must be worked out to clear up docket congestion. *See, e.g., Federal Power Commission v. Hunt*, 376 U.S. 515, 527 (1964) (critiquing "... the dangers inherent in the accumulation of a large backlog of cases with its accompanying irreparable injury to the parties.")

The Secretary argues, however, that the decisions below run afoul of principles of deference to agency discretion and separation of powers. Pet. at 21. Yet finding that the Social Security Act had been violated and seeing no other adequate remedy of law[26] the district court would have abdicated its responsibility by failing to fashion an appropriate remedy pursuant to its equitable powers. *Califano v. Yamasaki, supra*, 442 U.S. 682, 705 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978); *Hills v. Gautreaux*, 425 U.S. 284 (1976). These cases are typical of those enunciating both the broad reach of judicial authority,

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[26] Both courts below were well aware of the numerous difficulties unleashed by the remand-for-regulations approach in *Blankenship*. *See, e.g.*, Pet. App. A at 5a - 6a.

and the breadth and flexibility of equitable powers where authorities fail in affirmative obligations, which principles apply in statutory as well as constitutional violation cases. *Hecht v. Bowles*, 321 U.S., 321, 329-30 (1944); J.I. *Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

The cases cited by Petitioner alleging abuse of judicial authority below are clearly distinguishable. For example, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) is no bar to the relief granted herein. While this Court critiqued the challenge to administrative regulations in *Vermont Yankee*, the instant case attacks the very absence of regulations and the Secretary's ongoing failure to comply with "statutory minima." *Id.* at 548. Indeed, this Court was careful to clarify that "(a)dministrative decisions *should* be set aside in this context, *as in every other*, only for substantial procedural or substantive reasons as *mandated by statute...*" *(emphasis added) Id.* at 558. The judicial processing deadlines were imposed below to prevent irreparable injury to claimants caused by repeated administrative failure to come to grips with the problem of non-compliance with § 205(b) of the Act. This failure, which the record showed to be so unnecessary in so many cases, served to rebut the "presumption of regularity" which normally applies to the Secretary's administration of the Act. *See, Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

Similarly, there exists no legal authority barring the interim payment sanction utilized to insure the effectiveness of the court's order. The scope of equitable jurisdiction, to secure complete justice, does not yield to dubious arguments or inferences. *Porter v. Warner Holding Co.*, 327 U.S. 395, 398 (1946). Contrary to Petitioner's characterization, the interim payments should not be referred to as "disability insurance benefits," since they represent merely a mechanism[27] to insure compliance with an out-

[27] The district court could have as easily chosen the sum of $100 per month, or $500, or any other approach in seeking to secure compliance. *See, e.g., Rodriguez v. Swank*, 496 F.2d 1110, 1113 (7th Cir. 1974), *cert. denied*, 419 U.S. 885 (1974). A fully recoupable sum equivalent to the amount of DIB's otherwise due, however, represented a reasonable accomodation, easy to administer.

standing court order. Pet. App. A at 8a. The alternative remedial sanction, exercise of the contempt power in individual cases, would not benefit most wronged claimants, would interfere with judicial economy, and would be conceptually ludicrous. However, monetary payments contingent upon non-compliance with an injunction represent a traditional means of enforcement. *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947). The "... federal courts are not reduced to issuing injunctions ... and hoping for compliance, since financial penalties imposed prospectively against ... officials are usually the most effective of enforcement weapons." *Hutto v. Finney, supra*, 437 U.S. at 690. Neither *Schweiker v. Hansen*, 450 U.S. 785 (1981) nor *INS v. Miranda*, U.S. , 74 L.Ed. 2d 12 (1982) undercut the interim payment sanction, for in neither case was the question of the scope of a trial court's equitable powers at issue. *Hansen* was concerned only with misuse of the doctrine of equitable estoppel that had precluded SSA from raising a claimant's own failure to comply with a requirement of the Act. In *Miranda* there was neither a statutory requirement of reasonable processing nor any record evidence of unwarranted delay as in the instant case. Here, however, violations by the Secretary of both the statute *and* the court's remedial order are necessary to activate the interim payment device.[28]

In sum, the remedial approach adopted by the courts below responded appropriately to proven violations of

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[28] Nor does the doctrine of sovereign immunity, Pet. at 22, bar the issuance of an order providing prospective relief to remedy a statutory violation. *See, Ex Parte Young*, 209 U.S. 123 (1908); *Milliken v. Bradley*, 443 U.S. 267, 289 (1977); *Quern v. Jordan*, 440 U.S. 332, 337 (1979) (notice remedy advising recipients that they could appeal to the state for retroactive payments did not violate sovereign immunity because the charge on the treasury depended upon the actions of state officials.) Both *Army and Air Force Exchange v. Sheehan*, U.S. , 72 L.Ed. 2d 520 (1982) and *United States v. Testan*, 424 U.S. 392 (1976), cited by the Secretary, involved retroactive claims for back pay. In this case, the Secretary will only pay prospectively if she violates a court order.

the Act and stayed well within boundaries of equitable authority long recognized by this Court. While differences in remedial approaches are ever narrowing, any such variations hardly constitute a significant split in the circuits necessitating the intervention of this Court.

III. THE UNIQUE RECORD IN THIS CASE AND ONGOING ADMINISTRATIVE AND LEGISLATIVE DEVELOPMENTS MITIGATE AGAINST SUPREME COURT INVOLVEMENT TO SETTLE THE ISSUES RESOLVED BELOW.

(A) Numerous limiting factors mitigate against the exercise of certiorari jurisdiction. First, Vermont is a small rural state of about half a million people with only a few hundred appellate requests to process annually, *supra* at 2-3, and it hardly represents the ideal laboratory in which to examine problems present only elsewhere. Even when the Secretary articulates difficulties in complying with judicial deadlines, she cites only alleged problems incurred in Massachusetts or New York. Pet. at 16, n. 17 and 17,n. 21. Similarly as Respondents have noted, *supra*, the Petition conspicuously fails to discuss any Vermont data or facts from the record considered by the courts below. The nationwide data cited by the Secretary for the first time on appeal simply does not rebut the frequent examples of lengthy unexplained delay ascertained below nor the even-handed effectiveness of the Vermont order.[29] Likewise, the Petition alleges no need to

[29] Some of the other Social Security delay cases, however, contain factual records stressing national data. *Blankenship, e.g.*, with its nationwide remedy, would be a far more appropriate backdrop against which to examine the Secretary's claim of undue administrative burden. Indeed, the Secretary acknowledged as much when, in applying for (and obtaining) a sixty day extension in which to file the instant Petition, she relied primarily upon the hope that the Sixth Circuit would have acted in *Blankenship* by now. *See, Application For An Extension Of Time Within Which To File A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit* (Dec. 1982).

divert resources to Vermont nor any increased administrative burden upon the Secretary's operations there as a result of the decisions below.

It is significant as well that the instant case is the only one to address the problem of delay at the reconsideration stage of appeal. In fact, the Secretary stresses that reconsideration processing "... is primarily the responsibility of the states, not the federal government." Pet. at 12. Respondents submit that this represents tacit acknowledgement that at least reconsideration delays are so factually unique as to be far from a matter of paramount concern to this Court. Indeed, the State of Vermont's failure to intervene over the five year course of this litigation is indicative of the absence of any adverse impact upon Vermont processes.

Even with her emphasis upon problems beyond Vermont's borders, the Secretary's claim of undue burden seems dubious. In one recent delay case, she stipulated to a near universal ability to comply with court orders 99% of the time in the five SSA regions of the country where orders were in effect. *Williams v. Schweiker, supra,* 541 F. Supp. at 1364. This seems hardly consistent with the claim that "increasing balkanization" impedes efficient nationwide administration. Pet. at 17. It certainly illustrates that judicial remedies in the delay cases have resulted in few payouts under interim payment sanctions. In any event, many of the difficulties allegedly encountered by the Secretary are largely of her own making.[30]

(B) In all of the disability delay cases, the Secretary has repeatedly sounded the theme "... that the problem inherently is one for administrative or legislative - not judicial - resolution." Pet. at 20. Indeed, at least since 1975, congressional activity has been ongoing. *Id.* at 19. Yet the Secretary fails to note that the lack of legislative time-frames is directly related to her frequent soothing assurances to Congress that the problem of disability

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[30] *See* discussion, *supra,* at 4-6 and *infra,* especially n. 31.

delays would shortly be cured."[31] No solution, however, has been forthcoming from the Secretary, notwithstanding the *Blankenship* litigation and the unfulfilled 1980 Congressional mandate to "recommend the establishment of appropriate time limitations." Pet. at 6. The Petition goes on to attach significance to the fact that "Congress took no action to impose such deadlines after receiving the Secretary's report."[32] *Ibid.* Yet, neither has Congress legislated any changes in the judicial deadline approach that has been extant since the *White* district court order in 1976. The absence of conclusive legislative action is not dispositive of the issue. *Girouard v. United States*, 328 U.S. 61, 69 (1946). Congressional inaction as easily represents approval of the approaches taken in the disability delay cases as the converse.

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[31] *See, e.g., White*, 559 F.2d at 860 and n. 10 regarding the 1975 promise of a June, 1977 90 day-to-hearing capability. Congress has repeatedly signaled its willingness to commit resources to maintain "... an adequate staff so that reasonable case-processing times exist at all levels of adjudication." H. Comm. On Ways and Means, *Report on the Disability Amendments of 1982*, No. 97-588, 97th Cong. 2nd Sess. (1982) at 20. However, even at the end of 1981, SSA was still assuring Congress that under current resource limits, processing delays would be minimal and caseloads under control by the end of fiscal year 1983. *Social Security Appeals and Case Review Process*, Hearings Before the Subcomm. on Social Security of the H. Comm. on Ways and Means, Serial 97-31, 97th Cong., 1st Sess. 18, 21 (Oct. 23, 28, 1981).

[32] This is an ironic argument, indeed. Pub. L. 96-265, § 308 required a recommendation to Congress of "the maximum period of time" in which Title II hearing decisions would be complete. The Secretary's response - 165 days - included attached regulations to that effect "to be promulgated in connection with the *Blankenship* case." In fact, SSA sent a report to the relevant subcommittee "specifying the time limits which we believe are realistic, which we plan to achieve, and for which we expect to be held accountable." House Comm. On Ways and Means, Subcomm. on Soc. Sec., *Status of the Disability Insurance Program*, WMCP 97-3, 97th Cong. 1st Sess. (1981), App. C at 43, 45. This proposal, later repudiated, *see supra* at 16, was hardly calculated to lead to legislated deadlines.

Congress is now clearly moving in the direction of ever increasing protections for disabled claimants suffering unreasonable delays. A nationwide legislative resolution of the problem may be imminent, for "a comprehensive review of the disability program" is to be undertaken this year. 128 Cong. Rec. 13860 (daily ed. Dec. 3, 1982) (remarks of Sen. Dole).

Indeed, in its most recent Social Security legislation, Pub. L. 97-455, 96 Stat. 2497 *et seq.* (1983), Congress enacted numerous protections that should cure many of the difficulties perceived by the Secretary. For example, Sections 4 and 5 of the law, requiring face-to-face interviews and termination hearings in the reconsideration process, will undoubtedly alleviate the hearing backlog as more cases are resolved favorably for claimants prior to the ALJ level and its 65% reversal rate. The relaxation of the periodic review requirement in Section 3 will help achieve the same end. In addition, Section 2 of the new law now provides for continued benefits pending an ALJ hearing in CDI cases, which is similar to the relief provided below in the event of continuing unreasonable delays that violate the court's order. Significantly, however, the new law does *not* include Rep. Pickle's proposed amendment that would have prohibited the interim payment sanction utilized in the instant case.[33]

Finally, it remains beyond dispute that, despite ongoing involvement in the delay problem, Congress has *never repudiated, nor modified,* the "reasonable" requirement in § 205(b) of the Act. As the Second Circuit noted below in following the approach of *Caswell,* the possibility of ultimate congressional action " 'does not mean that a judicial role is precluded where the statutory

[33] *See,* H.R. 6181, H.R. Rep. No. 97-588, 97th Cong., 2d Sess. § 10 (1982). Detection by this Court of any inconsistencies between the latest SSA amendments and the relief granted below, which Respondents do not concede, would provide no basis for granting the instant Petition. At most, a remand to the Second Circuit for re-examination of its ruling in light of the amended statute might be appropriate. *See, Fusari V. Steinberg, supra.*

mandate is not being followed.' " Pet. App. A at 6a. Similarly, the Sixth Circuit's 1978 remand order acknowledged that "... courts may not abdicate their role and deny any *effective* remedy because the problem is difficult." *Blankenship*, 587 F.2d at 336 (emphasis added).

The Secretary predicts dire consequences unless this Court takes steps to curtail "the proliferation" of decisions such as the ruling below. The courts in this case, however, in reviewing Respondents' complaints about her practices in Vermont, found little to justify the Secretary's anxiety. Nothing in this case has ever shown that the outcome affects SSA's practices nationwide, and it is thus a poor vehicle for an examination of those practices by this Court. Furthermore, to the extent that delays in administrative appeals have generated concern beyond the borders of Vermont, it is apparent that Congress is keenly aware of the tension between the courts and SSA. The impact of the latest statutory amendments, certain of which were adopted "on a one-year experimental basis," (Pet. at 6), cannot yet be estimated, and additional enactments are probable. With the Act in a state of flux, review by this Court at this time on this record would be premature, at best.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
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COUNSEL FOR RESPONDENTS

April 4, 1983

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 79-1751, 79-1752, & 79-1937 September Term, 1980

LENA COCKRUM, *et al*

v.

PATRICIA ROBERTS HARRIS, as Secretary of the Department of Health and Human Services, Appellant

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Appeals from the United States District Court GEORGE A. FISHER, clerk of Columbia.

Before: WRIGHT, Chief Judge, and MIKVA and EDWARDS , Circuit Judges.

JUDGEMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel.

Because of the action being taken by the Secretary implementing the order of the United States Court of Appeals for the Sixth Circuit (*see Blankenship v. Secretary of HEW*, 587 F.2d 329 (6th Cir. 1978), *vacating and remanding* W.D. Ky. Civil Action No. 75-0185), in our view this case should be remanded to the District Court here to await a final judgment in the above litigation in the Sixth Circuit. We have received official assurance from counsel for the Government that the interim guidelines now being followed by the Secretary of 90 days for holding a hearing and 30 days for disposition will continue in effect until the Secretary's regulations are finally approved. If and when approved, the District Court here should consider dismissal of its judgment. In the meantime, its judgment should be stayed, subject to further review, if necessary.

Under the circumstances, therefore, it is by this court so ordered.

Per Curiam
For the Court
George A. Fisher
Clerk